

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 August 2006

BALCA Case No.: 2005-INA-124
ETA Case No.: P2002-CA-09537089

In the Matter of:

NOEL SALVADOR,
Employer,

on behalf of

NENITA DUGAS MONDANO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Marcelino C. Maxino, Esquire
Tracy, California
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This is an appeal of the denial by a federal Certifying Officer (CO) of a permanent alien labor certification application. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.¹ This

¹ This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File (AF). 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 12, 2001, Employer, Noel Salvador, filed an application for alien employment certification on behalf of the Alien, Nenita Mondano, to fill the position of Domestic Helper, Cook and Language Tutor. (AF 48-49). The job to be performed was described as follows:

As domestic helper, alien will do household chores, such as cooking, laundry, cleaning the house, doing the dishes, making the beds, runs errands, and some yard work. As cook, alien will cook various kinds of food, particularly including Filipino foods, such as adobo, paksiw, sinigang, pinakbet, and lumpia, which are employer's favorites. As language tutor, alien will teach the children Tagalog, which is the language of the culture to which employer was born and which employer wants his children to learn so than [sic] in a gathering of Filipino-Americans where Tagalog is spoken, his children will not find themselves out of place.

Minimum requirements for the position were listed as three months of experience in the job offered.² Other Special Requirements were listed as “[m]ust be bilingual (English and Tagalog). Must also know how to cook Filipino foods, such as adobo, lumpia, sinigang, pinakbet, and paksiw, which are employer's favorite dishes.”

Employer reported having received no applicant referrals in response to his recruitment efforts. (AF 55).

A Notice of Findings (NOF) was issued by the CO on July 28, 2004. (AF 42-46). The CO found Employer's combination of language tutor and domestic worker in violation of 20 C.F.R. § 656.21(b)(2)(ii) and further noted that Employer's children attended school during the day and hence were not available for tutoring. Employer was

² Employer initially required one year of experience, but later amended his application to three months of experience in response to an Assessment Notice finding that one year was excessive. (AF 66-72)

instructed to delete the requirement and retest the labor market, justify the combination on the basis of business necessity, or show that the combination is normal and customary. The CO further questioned Employer's experience requirement and a live-in requirement listed in the print advertisement.

In Rebuttal, Employer agreed to retest the labor market without a live-in or experience requirement. With respect to the combination of duties issue, Employer attempted to justify the combination as a business necessity. Employer asserted his "business" of "running my household . . . includes deciding what values the family should embrace." Employer asserted that the children would be tutored in Tagalog after school for an hour each day, which would make hiring a part-time teacher infeasible. As further justification, Employer asserted there are no Filipino language schools in the area, nor any equipment on the market for teaching Tagalog to children. (AF 14-41).

A Final Determination denying labor certification was issued by the CO on September 28, 2004, based upon a finding that Employer had failed to adequately address the combination of duties issue. (AF 11-13). Noting that the NOF did not question the need for a language tutor, but only the issue of combining the duties of tutor and domestic worker, the CO found Employer's rebuttal documentation unpersuasive. The CO observed that Employer had presented no evidence that individual language tutors were unavailable.

Employer filed a Request for Review by letter dated October 27, 2004, which was treated as a Motion for Reconsideration and denied on November 15, 2004. Employer appealed by letter dated November 22, 2004 and the matter was referred to this Office and docketed on April 22, 2005. (AF 1-10).

DISCUSSION

Federal regulations at 20 C.F.R. § 656.21(b)(2), require an employer to document that its requirements for the job opportunity, unless adequately documented as arising

from business necessity, are those normally required for the performance of the job in the United States. Title 20 C.F.R. § 656.21(b)(2)(ii) states that the job to be performed cannot describe a combination of duties that is not normal to any of the occupations mentioned. The job duties must be those as defined in the Dictionary of Occupational Titles (DOT) and not go beyond any single DOT job description. If the job opportunity involves a combination of duties, the employer must document that 1) it has normally employed persons for that combination of duties, and/or 2) that workers customarily perform the combination of duties in the area of intended employment, and/or 3) that the combination job opportunity is based upon business necessity.

The Board in *Robert Lippert L. Theatres*, 1988-INA-433 (May 30, 1990) (en banc) noted that the first two prongs of this provision, the "normally employed" and "industry norm" tests, are "fairly straightforward and easily applied". For example, the Board has previously held that, where a combination of duties is consistent with the description of the job in the DOT, the combination is normal and business necessity need not be shown. *Alan Bergman Photography*, 1988-INA-404 (Sept. 28, 1989). Similarly, in *Van Boerum & Frank Associates*, 1988-INA-156 (Dec. 5, 1989), a small engineering firm justified a combination of managerial and training duties by documenting that, although it had never used the combination, it was customarily used by firms in the area of intended employment.

Thus, the business necessity prong is only reached if the employer cannot establish one of the first two prongs. The Board in *Lippert* held that "for a combination of duties to be based on business necessity under section 656.21(b)(2)(ii), an employer must document that it is necessary to have one worker to perform the combination of duties, in the context of the employer's business, including a showing of such a level of impracticability as to make the employment of two workers infeasible. The intent of this formula is to focus the parties on addressing the fundamental issue of why it is necessary to have one worker perform the duties instead of two or more. Implicit in this standard is a showing by the employer that reasonable alternatives such as part-time workers, the purchase of new equipment, and a reordering of responsibilities within the organization

are infeasible. In addition, though not necessary to satisfy the test, a showing that the duties are essential to perform each other would weigh heavily in favor of business necessity." (footnote omitted). The Board further held that "[a] mere showing that the combination produces financial savings, or adds to the efficiency or quality of the employer would not, therefore, satisfy the above standard." *Lippert, supra.* (footnote omitted).

In the instant case, Employer has failed to show "such a level of impracticability as to make the employment of two workers infeasible." *See Lippert, supra.* Employer has failed to demonstrate why it is necessary to have one worker perform the duties instead of two, and has not shown that reasonable alternatives such as a part-time tutor were explored. Employer stated that to hire a separate tutor was "inapposite, ineffective and infeasible," but gave no indication that he even tried to hire a part-time tutor.

On this basis, we conclude that Employer has failed to justify the combination of duties as a business necessity, and thus determine that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.